decided by Raja Azlan Shah J., as he then was, in *Leong Gan & Ors.* v. *Tan Chong Motor Co. Ltd.*[2] See also *Mark D'Cruz* v. *Jitendra Nath Chatterjee.*[3] In both these cases an oral agreement to renew an existing lease was held inadmissible. As the admissibility of the alleged oral agreement is both prohibited by section 92 of the Evidence Act and proviso (d) to the section, the provision of clause 2 (3) of the lease remains unmodified or unamended. It also remains unacted upon because an attempt to renew it by means of the oral agreement cannot be effective; it being contrary to the provision of the renewal clause. Thus the alleged oral agreement is neither effective, nor admissible to prove the renewal.

Even if we view the alleged oral agreement from the standpoint of the Sabah Land Ordinance, it is clear that the agreement is valueless, as it is neither in writing nor registered; it being contrary to the requirements of sections 88, 104 and 105 of the Ordinance.

That being the case, it is not enough for the respondent in answer to the appellants' application to sign final judgment, to raise an issue, or any issue. He must, however, raise such issue as would require a trial in order to determine it. In other words, the issue raised must be an arguable issue. But where the issue raised is irrelevant and ineffective, or to use the words of Lord Greene, M.R. in *Cow* v. *Casey*[4] "when the point is understood and the court is satisfied that it is really unarguable", the appellants should be entitled to what they prayed for in the summons-in-chambers.

In our view the point raised by the respondent as to the existence of an oral agreement to renew the lease of the ground floor of the demised premises in this case is really not an arguable issue as it is neither effective, nor admissible, and therefore does not constitute a triable issue. The appellants should be and are therefore allowed to sign final judgment in terms of the summons-in-chambers.

The appeal is allowed with costs. The deposit should be refunded to the appellants.

Appeal allowed.

Solicitors: *Jayasuriya Kah & Co.; Shelley Yap & Co.*

MERDEKA UNIVERSITY BERHAD v. GOVERNMENT OF MALAYSIA

[F.C. (Suffian L.P., Raja Azlan Shah C.J. (Malaya), Salleh Abas & Abdul Hamid F.JJ.; and Seah J., dissenting) February 15-19, 22, 23, 25 & 26, July 6, 1982] [Kuala Lumpur – Federal Court Civil Appeal No. 236 of 1981]

Administrative Law – Declaration – Claim for declaration that rejection of application of petition for establishment of Merdeka University null and void – Allegation that refusal of petition for establishment of the University unreasonable and improper exercise of discretion – Principles of judicial review – Effect of subjective formula as to satisfaction – Whether University a public authority within the definition of Federal Constitution – National Language – Official purposes – Universities and University Colleges Act, 1971, ss. 3, 5, 6, 7, 8, 11, 13, 15A and 15D – Federal Constitution, arts. 8(2), 12(1)(a), 40(1), 152 & 160.

Constitutional Law – Yang di-Pertuan Agong a Constitutional monarch acting on ministerial advice – Principles of Constitutional interpretation – Whether University a public authority within the meaning of the Federal Constitution – National language – Official purposes – Federal Constitution, articles 8(2), 12(1)(a), 40(1), 152 & 160.

Education – Petition for establishment of University – Whether University a public authority under the Federal Constitution – National Language – Official purpose – Universities and University Colleges Act, 1971, ss. 3, 5, 6, 7, 8, 11, 12, 13, 15A & 15D – Federal Constitution, arts. 152 & 160.

Interpretation – Principles of Constitutional interpretation – Maxim "noscitur a sociis" – Ejusdem generis.

This was an appeal from the decision of the High Court reported in [1981] 2 M.L.J. 356.

The appellant, a company limited by guarantee, submitted a petition to the Yang di Pertuan Agong for an incorporation order for Merdeka University under section 6 of the Universities and University Colleges Act, 1971. The petition was rejected and the Minister of Education announced that the rejection of the appellant's petition was for the following reasons:

(a) Merdeka University would use Chinese as the medium of instruction;

(b) it was meant to cater for students from Chinese independent secondary schools;

(c) it was to be set up by the private sector;

and as a composite of the basis for rejection, that in effect its establishment would be contrary to the national education policy.

The appellant issued a writ asking for a declaration that the rejection of the petition for the establishment of the Merdeka University was null and void as it contravened the Federal Constitution and for a declaration that the refusal of the petition to establish a University was an unreasonable and improper exercise of the discretion conferred by section 6 of the Universities and University Colleges Act, 1971. The learned Judge held that the rejection was law-

ful on the ground *inter alia* that if the Merdeka University were established, it would be a public authority within the definition in Article 160 of the Federal Constitution and its purpose would accordingly be an official purpose within Article 152(b) of the Federal Constitution and it would therefore be excluded by the parenthesis in proviso (a) to Article 152(1) from its protection. Consequently as the Merdeka University proposes to give instruction in its courses in Chinese, whether as the only or the main medium for instruction, the proviso would afford no protection for the purpose and it may be prohibited by the Government.

The appellant appealed.

Held (by a majority): (1) a university is a statutory authority exercising powers vested in it by federal law and therefore a public authority;

(2) Merdeka University if established would be a public authority within Article 160(2) of the Federal Constitution and accordingly teaching in Chinese would be use of the language for an official purpose, which use may be probihited under Article 152 of the Constitution;

(3) as there is no right to use the Chinese language for an official purpose, it was not unconstitutional and unlawful of the Government to reject the petition to establish Merdeka University;

(4) in regard to the other arguments raised by the appellant, the Federal Court were in complete agreement with the conclusions of the learned trial judge and the application of the principles of law involved to the facts of the case.

Cases referred to:

(1) *Griffiths* v. *Smith* [1941] A.C. 170
(2) *Attorney-General* v. *Company of Proprietors of Margate Pier and Harbour* [1900] 1 Ch. 749.
(3) *Minister of Home Affairs* v. *Fisher* [1980] A.C. 319, 329.
(4) *Adegbenro* v. *Akintola* [1963] 3 All E.R. 544.
(5) *Pathumma* v. *State of Kerala* A.I.R. 1978 S.C. 771.
(6) *Dilworth* v. *Commissioner of Stamps* [1899] A.C. 99.
(7) *Lyndon* v. *Standbridge* (1857) 2 H & N 45, 51; 157 E.R. 19, 22.
(8) *Queen* v. *Edmundson* (1858) 28 L.J.M.C. 213, 215; 121 E.R. 30, 33.
(9) *Bradford Corporation* v. *Myers* [1916] 1 A.C. 242.

FEDERAL COURT.

Michael Beloff Q.C. (with him *Ker Kim Tin, Soo Thien Ming, Tan Chek Yoke, J.C. Bernatt, Soo Lim Peng, Lee Shan Too, Ong Tin Kim, Low Sik Thong, Ngeow Yin Ngee* and *Siew Yew Ming*) for the appellant.

Tan Sri Datuk Abu Talib bin Othman, Attorney-General, (with him *Lim Beng Choon*, Senior Federal Counsel) for the respondent.

Cur. Adv. Vult.

Suffian L.P. (delivering the Judgment of the Court): The judgment which I am about to deliver is the joint judgment of the Chief Justice, Salleh Abas, F.J. Abdul Hamid, F.J. and myself.

This appeal arises out of the rejection by His Majesty the Yang di-Pertuan Agong of the petition of the plaintiff for permission to establish a private university, Merdeka University ("MU"), which rejection was held by the learned trial Judge to have been lawful.

BACKGROUND OF EVENTS

The background is as follows.

The idea of founding MU was formed in 1967 through the initiative of certain Chinese guilds and associations under the leadership of the United Chinese School Committees' Association and the United Chinese School Teachers' Association ("the two Associations"). On April 14, 1968 at an inaugural meeting of Chinese guilds and associations from all over the country held at the Chinese Assembly Hall in Kuala Lumpur for the proposed university, a Proclamation was passed and approved together with a draft Plan for MU dated April 10, 1968 and issued by the Educational Committee of the two Associations. Mr. Lim Fong Seng, the Chairman of the plaintiff company, stated in his evidence that the Proclamation and Plan truthfully reflected the aims and intention of those who wanted to establish MU and that at that meeting a working committee was set up for its establishment according to the aims and intention shown in these two instruments. The invitation to attend that meeting was only through the Chinese press and the intention was to confine it only to the Chinese community. At the meeting no donations were made but there were pledges of financial support from all the people present. Mr. Lim further said that the public response was very good and donations for the plaintiff were received even before it was registered.

The plaintiff company was incorporated on May 8, 1969 as a company limited by guarantee under the Companies Act, 1965, its primary object being, as stated in its memorandum of association, "to continue, establish and carry on in the Federation of Malaysia a University for the promotion of learning, arts, science and research, the provision of higher education, and the conferment of degrees." The plaintiff was unable to proceed further in view of the unfortunate turbulence that started on May 13, 1969, and in the meanwhile the

Universities and University Colleges Act, 1971, Act 30 ("the 1971 Act") was enacted and came into force on April 30, 1971.

The Council of the plaintiff at its meeting on April 23, 1977, resolved to adopt the Proclamation and Plan for MU referred to earlier and to submit a petition to the Yang di-Pertuan Agong under section 6 of the 1971 Act for an incorporation order for the establishment of the proposed MU based on the principles and objectives of these two instruments, and it also appointed a drafting committee for this purpose. Mr. Lim testified that although in 1977 Malaysia had five universities as against only one in 1968, there was still a need for another university because opportunities for tertiary education still remained insufficient, in particular, for those who are not Malays.

Section 6 of the 1971 Act provides:

"6. (1) If, the Yang di-Pertuan Agong is satisfied that it is expedient in the national interest that a University should be established, he may by order –

(a) declare that there shall be established a higher educational institution having the status of a University, which shall be a body corporate, for the purpose of providing, promoting and developing higher education in all such branches of learning as shall be specified in the order;

(b) assign a name and style to that University; and

(c) specify the location of the site which shall be the seat of that University.

(2) An Order made under subsection (1) (hereinafter referred to as the 'Incorporation Order') shall, at the next meeting of Parliament, be laid before both Houses of Parliament."

A petition dated January 30, 1978 praying for an incorporation order for MU under section 6 of the 1971 Act was accordingly submitted to His Majesty by the plaintiff and endorsed with the supporting signatures of some 4,238 Chinese guilds and associations throughout the country, and copies were sent to the Prime Minister, the Minister of Education and all members of Parliament. The petition was in three languages – Malay, English and Chinese. The Malay version speaks of Chinese as the medium of instruction with the emphasizing of the teaching of Malay and English, whereas the English version refers to Chinese as a major medium of instruction and also highlighting learning of and training in Malay and English. Datuk Musa bin Hitam, the Deputy Prime Minister and Minister of Home Affairs, Malaysia since July 1981 who was the Minister of Education in 1978 at all times material to these proceedings, said in his evidence that he considered the version in Malay (which is the official language) as the authoritative text, it being an official matter. It is not in dispute that since 1978 in accordance with the provisions of Article 153 of the Federal Constitution bumiputras were granted favoured access to the then established universities in the country.

PETITION REJECTED AND REASONS THEREFOR

There was a request by the plaintiff by a letter dated May 4, 1978 for a dialogue with the Minister to clarify matters if necessary or to volunteer further information and exchange ideas, followed by a reminder on September 11, 1978 but with no response to either. The Minister in a speech at the United Malays National Organisation (UMNO") General Assembly on September 17, 1978 announced the rejection of the plaintiff's petition and gave the following reasons for it:

(a) MU would use Chinese as the medium of instruction;

(b) It was meant to cater for students from Chinese independent secondary schools;

(c) It was to be set up by the private sector;

and, as a composite of the basis for rejection, that in effect its establishment would be contrary to the national education policy.

The Plaintiff issued a statement on September 22, 1978 as a result of the Minister's speech, refuting the reasons given for the rejection of its petition and also sought to convene a meeting of Chinese guilds and associations at which, according to Mr. Loot Ting Yee, the Assistant Secretary of the plaintiff and Vice-Chairman of the United Chinese School Teachers' Association, some 8,000 representatives and observers would have attended, but which however did not materialize for the reasons he gave.

In a debate in Parliament on October 10, 1978 on a motion to amend the 1971 Act the Minister explained why the defendant had to reject the application by the private sector to set up MU. The plaintiff wrote to the then Prime Minister on November 11, 1978 complaining of the Minister's lack of response to its request for a dialogue and his announcement of the rejection of the petition without any such dialogue and requesting one with the Prime Minister; but in a reply thereto on November 20, 1978 the plaintiff was told that as the matter would be debated in Parliament the Prime Minister did not think it desirable to have a

dialogue with the sponsors as requested. In a further debate in Parliament on December 11, 1979 on a motion by the leader of the Opposition with regard to the establishment of MU, the Minister went into the reasons he gave at the UMNO General Assembly in September for the rejection of the plaintiff's petition and explained them at some length, and in dealing with the third reason, that is to say, that it is to be set up by the private sector, he said that the rejection on this ground only applies in the context of MU and does not cover proposals to set up any other private university.

The Chief Secretary to the Government by a letter dated January 25, 1979 informed the plaintiff that His Majesty after consideration of the petition submitted had decided to reject its application for the establishment of MU.

RELIEF SOUGHT BY PLAINTIFF

The plaintiff as a result issued the writ out of which arises this appeal on September 16, 1980 and claims as relief a declaration that the defendant's rejection of its petition for the establishment of MU is null and void as it contravenes the Federal Constitution and also a declaration that the refusal of its petition to establish MU is an unreasonable and improper exercise of the discretion conferred by section 6 of the 1971 Act. The plaintiff originally also sought other reliefs which were however abandoned during the course of the hearing.

In the result the learned Judge dismissed the plaintiff's claim for the declaration sought, [1981] 2 M.L.J. 356.

The plaintiff appeals to us. The issue before us is the same as the issue before the learned Judge and that is whether the defendant Government has in the circumstances acted constitutionally, reasonably and fairly.

CONSTITUTIONAL MONARCH

Though the plaintiff's application was rejected by His Majesty, in fact the decision was that of the Government, because His Majesty is a constitutional monarch and in this regard he was required by Article 40(1) of the Constitution to:

"act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet ..."

That is why the Government has been cited as the defendant.

Under section 6 of the 1971 Act before His Majesty may make an incorporation order establishing a university it is a condition precedent that:

(1) he has to be satisfied,
(2) that it is expedient,
(3) in the national interest,
(4) that a university should be established.

If he is not so satisfied he has no power to make an incorporation order and must reject the application.

But even if the condition precedent is met His Majesty has a discretion whether or not to make the order and he has power – but not a duty – to do so; but as a general rule, as the learned Judge stated (page 360) once the condition precedents are fulfilled then the power ought to be exercised unless it is impracticable to do so.

The substantial questions for the learned Judge's consideration are whether or not in the exercise of His Majesty's power under section 6 of the 1971 Act, he and in effect the Government took into account legally relevant considerations and acted fairly, whether there was misdirection in fact and in law (including the Constitution); whether or not the decision was made on sufficient material and evidence or on extraneous considerations or was so unreasonable that no reasonable person could have come to it.

It will be noted that section 6 used the formula "If the Yang di-Pertuan Agong is satisfied etc." In the past such a subjective formula would have barred the courts from going behind His Majesty's reasons for his decision to reject the plaintiff's application; but, as stated by the learned Judge, administrative law has since so far advanced such that today such a subjective formula no longer excludes judicial review if objective facts have to be ascertained before arriving at such satisfaction and the test of unreasonableness is not whether a particular person considers a particular course unreasonable, but whether it could be said that no reasonable person could consider that course reasonable – see the cases cited by the learned Judge at page 360. Mr. Beloff before us accepts this test, but argues that the learned Judge while aware of the correct test misapplied it and that if he had

applied it correctly he should have come to the opposite conclusion.

ARTICLE 152

As already stated, the first reason given by the Minister for rejecting the plaintiff's application for an order to establish MU was because MU would use Chinese as the medium of instruction which would conflict with the national education policy. In evidence the Minister said that the objection was to the use of Chinese as the main medium of instruction and in cross-examination said that even if it were to be a major medium and not the only medium of instruction it would still conflict with the national education policy.

Article 152(1) of the Constitution provides that the national language shall be the Malay language now commonly known as bahasa Malaysia or simply bahasa, but this is subject to an important proviso which reads:

"Provided that –

(a) no person shall be prohibited or prevented from using (otherwise than for official purposes), or from teaching or learning, any other language; and

(b) nothing in this Clause shall prejudice the right of the Federal Government or of any State Government to preserve and sustain the use and study of the language of any other community in the Federation."

As regards Mr. Beloff's argument regarding Article 152, he accepts the position of bahasa as the national and official language. He does not attack the official policy of giving preference to bumiputra admission into university. He does not contend that the plaintiff has a right to establish MU, but accepts that Government has a discretion under the 1971 Act to allow or reject the plaintiff's petition, but contends vigorously, though not emotionally as another lawyer might have done, that in rejecting the plaintiff's petition Government has, though in good faith, contravened Article 152.

The controversy around this Article is this I Mr. Beloff contends that the Article prohibits the use of Chinese for official purposes, but not for unofficial purposes, that as "official purpose" is defined by clause (6) of Article 152 as meaning –

"any purpose of the Government, whether Federal or State, and includes *any purpose of a public authority*";

and as public authority is defined by Article 160 (2) as follows:

"[It] means the Yang di-Pertuan Agong, the Ruler of Yang di-Pertua Negara of a State, the Federal Government, the Government of a State, a local authority, *a statutory authority exercising powers vested in it by federal or State law*, any court or tribunal other than the Federal Court and High Courts or any officer or authority appointed or acting on behalf of any of those persons, courts, tribunals or authorities";

MU if established would not be a public authority as defined and teaching in Chinese there would not be use for an official purpose, and that therefore it was unconstitutional of the Government to reject the plaintiff's petition. On the other hand, the learned Attorney argues that MU would be a public authority, that teaching in Chinese there would be using the language for an official purpose and therefore not a right protected by Article 152 and that accordingly the Government was acting within its power to reject the plaintiff's application.

It would seem to us that if the learned Attorney is right, that is that MU if established would be a statutory authority exercising powers vested in it by federal law and therefore a public authority, it would necessarily follow that teaching in Chinese there would be using Chinese for an official purpose, and therefore it is not protected by the bracketed words in proviso (a) of Article 152(1), and that on the contrary it would be prohibited. Should we come to this conclusion then it would appear that that would be the end of the matter, and there would be no need for us to consider any of the other arguments addressed to us by Mr. Beloff in support of this appeal.

HISTORY OF LANGUAGE PROVISIONS

It will help in determining who is right and who is wrong on the language issue if we set out its history. Before the last war in official circles English was much in use though bahasa was also used particularly at the subordinate level in the old Federated Malay States, that bahasa was used more than English in the other non-Federated Malay States, and that English was used more than bahasa in the two colonies of Penang and Malacca.

When these territories were brought together as the Federation of Malaya, the Federation of Malaya Agreement, 1948, the then constitution, had no language provision of general application like Article 152. It had language provisions specifically with regard to three matters. With regard to the first two matters, namely the Federal Executive Council and the Federal Legislative Council, it

provided that the official languages of these bodies:

"shall be English and Malay:

Provided that anything which is required to be printed or reduced into writing shall be expressed in the English language (see Clauses 35 and 63)"

With regard to the third matter, language of the Agreement itself, Clause 156 provided:

"This Agreement shall be expressed in both the English and the Malay languages; but, for purposes of interpretation, regard shall be had only to the English version."

Eight years later in 1956-7 when independence was drawing near, a Royal Commission under the chairmanship of Lord Reid was jointly appointed by the British Government and the Rulers to draft our present Constitution. They recommended in paragraphs 170 and 171 that bahasa should be the *national* as well as the official language, though for a period of at least ten years English should continue to be used as an official language.

The two paragraphs 170 and 171 read as follows:

"170. We received a large number of representations on this subject. After giving full consideration to them we have decided to recommend (Art. 140) that Malay should be the national language and that for a period of at least ten years English should continue to be used as an official language. There are many citizens of the Federation who have had little opportunity in the past of learning to speak Malay fluently, and we think that it would not be fair to them that Malay should become the sole official language in the immediate future. Moreover we think that it would be impractical to abolish the use of English before 10 years have elapsed. After 10 years it should be left to Parliament to decide when a change should be made and we have framed our recommendations so as to enable Parliament to proceed by stages if it thinks fit to do so. It may be found desirable first to discontinue the use of English for some purposes and then to discontinue its use for other purposes at some later date. We do not recommend that any other language should become an official language. This has not been found necessary in the past and we think that it might lead to great inconvenience. But in the past it has been found desirable that many notices, announcements and other documents should be published in Chinese and Tamil as well as in Malay and English and we think that this will continue to be desirable for some considerable time. Our recommendations will not prevent this being done, but it is impossible to define the circumstances in which it should be done.

171. We have been impressed by representations that the existing law may prevent the election to the legislatures of persons whom the electors may desire to elect, and we recommend two changes: in the first place we think that there should be no language qualification for candidates, we have drafted Article 41 in such a way as to abolish this qualification and prevent its reimposition. Secondly we think that for ten years there should be a limited right to speak in a legislature in a Chinese or Indian language. Our proposal limits this right to those who cannot speak fluently in either Malay or English, and for practical reasons it is necessary to limit the right to cases where a member who can speak the language in question can take the chair and where there can be a record of the speech. We do not recommend the institution of a system of interpretation; it would be cumbrous and expensive and might be difficult to operate. Our recommendation is based on the view that speeches in Chinese or Indian languages should be exceptional and we would not think it right to open the door for the regular use of these languages in debate. There are some purposes, such as the authoritative text of an Act of Parliament and proceedings in Courts of Justice other than taking of evidence, for which it may be found best to retain the English language for a considerable number of years, but we think that it is right that for all ordinary purposes Malay should in due course become the sole official language. Our recommendations are not intended to put obstacles in the way of that transition, but rather to regulate the transition so that it may take place in a manner fair to all communities."

The Reid Report was published for general discussion and debate and after considering the views made known in the Press and elsewhere the Malayan and British Governments made known their decisions which were published in 1957 in a White Paper entitled "Federation of Malaya – Constitutional Proposals." The Malayan Government then was the coalition known as the Alliance consisting of members of the three major racial parties: UMNO, the Malayan Chinese Association and the Malayan Indian Congress. They too agreed to make bahasa the national as well as the official language, but typically they balanced this decision by protecting the use of other languages for unofficial purposes. The relevant paragraph of the White Paper reads:

"61. It is proposed to make three changes in the recommendations of the [Reid] Commission on the subject of the national language. First, it is proposed to provide that no person shall be prohibited or prevented from using (otherwise than for official purposes) or from teaching or learning any language. Secondly, it is proposed that the Federal and State Governments shall have the right to preserve and sustain the use and study of the language of any community in the Federation. Thirdly, it is proposed not to accept the recommendation of the Commission that for a period of ten years there should be a limited right to speak in a Legislature in a Chinese or Indian language."

To give effect to the tri-racial Malayan Government's decision on this point, Article 152 was accordingly written in its present form except that the original words "the Supreme Court" in Clause (4) now read "the Federal or a High Court", and secondly Clause (6) was not inserted into the

Article until 1971 by the Constitution (Amendment) Act A30.

Be it noted that while the Federation of Malaya Agreement, 1948, used the words "official language", the present Constitution, while making it quite clear that bahasa is the language to be used for official purposes i.e. the official language, at the same time provides that bahasa should be also the national language.

It is well known that our constitution is modelled on the Indian constitution, and it is to be further observed that the Indian provisions on language (see Part XVII) use the expressions "official language and "regional languages", but not "national language".

Why the language difference between the two constitutions?

We think it reasonable to suppose that the framers of our Constitution deliberately chose to use the expression "national language" because they intended that bahasa should be used not only for official purposes but also as an instrument for bringing together the diverse and polyglot races that live here and thus promote national unity. Before independence there were separate schools with Malays going to Malay-language schools, Chinese to Chinese-language schools and Indians to Indian-language schools, thus keeping the three major communities apart. The only unifying factors were the comparatively few English-language schools where children of various races were taught a common syllabus in a common tongue and mixed freely and later produced the leaders who were largely instrumental in developing the country economically and politically. We think it reasonable to suppose that the framers of our Constitution who came from this group of Malayans – later Malaysians – concluded that just as before independence the English language could unify the small but highly influential group of leaders, so after independence the use of bahasa could and should be used as an instrument for unifying the whole nation.

A few cases were cited to us from the United States of America. We do not think that they are of much help to us, since in our view our constitution must be interpreted in the light of our own history, traditions and in the light of conditions prevailing in Malaysia, which are different from those of the United States. But when considering those authorities, we could not help thinking that the most important factor in welding the Americans who originated from countries in Europe and elsewhere, each with a different language, into one nation, united and proud to be Americans, strong and prosperous, was the use in school and university there of a single language, namely the English language and no other; and that while other languages are taught and learnt, they are so only as foreign languages. Perhaps the Fathers of our Independence too were aware of this and determined to profit from the American experience.

MEANING OF ARTICLE 152

Such was the background to Article 152, but in construing it, reference must be made to the National Language Act, 1963/67, of which the following sections provide:

"2. Save as provided in this Act and subject to the safeguards contained in Article 152(1) of the Constitution relating to any other language and the language of any other community in Malaysia the national language shall be used for official purposes.

4. The Yang di-Pertuan Agong may permit the continued use of the English language for such official purposes as may be deemed to be fit."

With regard to section 4, His Majesty has made an order published as P.U. 410 of 1967 permitting the continued use of English for certain official purposes – which does not, however, include university teaching in a language other than bahasa.

Reading Article 152 together with the National Language Act, in our judgment, the law may be stated as follows:

1. Bahasa is the national language;
2. Bahasa is the official language;
3. A person is prohibited from using any other language for official purposes – subject to exceptions as regards the continued use of the English language allowed by section 4 and of other languages by other provisions of the National Language Act;
4. No person shall be prohibited or prevented from using (to be specific) Chinese for unofficial purposes;
5. No person shall be prohibited or prevented from teaching Chinese;
6. No person shall be prohibited or prevented from learning Chinese;

7. The Federal or a State Government has the right to preserve and sustain the use and study of the language of any non-Malay community – as indeed the Federal Government is doing in school and at the Institute of Technology, Mara, and in the Departments of Chinese and Indian Studies and in some other departments at the University of Malaya where even Arabic, Japanese, Thai and other languages are taught. (This right belongs to Government).

Government cannot legally prohibit or prevent MU from teaching and offering courses to enable students to learn Chinese.

But the crucial question is: would MU be prohibited from teaching *in* Chinese as the sole or major medium of instruction? It certainly would if it is a public authority, for then the use of Chinese there would be use for an official purpose which the Constitution read together with the National Language Act says is prohibited.

MERDEKA UNIVERSITY A PUBLIC AUTHORITY?

It is to be observed that the plaintiff did not say that it proposed to teach Chinese and offer courses enabling students to learn Chinese at MU; its memorandum of association said that its primary object was, as earlier stated, "to continue, establish and carry on in the Federation of Malaysia a University for the promotion of learning, arts, science and research, the provision of higher education, and the conferment of degrees". In other words, MU would be a full-fledged university offering courses which one would expect any other university to offer.

Is teaching arts, science, conducting research and providing higher education in Chinese only or in Chinese as a major medium of instruction at MU using that language for official purposes within the meaning of the words within the brackets in proviso (a) to Clause (1) of Article 152 as contended by the learned Attorney-General and so held by the learned trial Judge?

It is not contended that MU if established would be Government, but it is contended that it would be a statutory authority exercising powers vested in it by federal law and therefore a public authority within Article 160 (2).

With respect, we agree with the learned Judge that MU would be a public authority for the reasons given by him. The operative word in the definition in Article 160(2) must necessarily be the word "authority", and for a person or body to constitute such an entity there must be some public element and utility in its constitution, operation, functions, powers and duties. Viscount Simon L.C. said at page 178 in *Griffiths* v. *Smith*[1] with regard to the managers of a non-provided public elementary school that the body of managers are a statutory body created by the relevant statutes for the discharge of public duties and therefore a public authority and are not analogous to companies acting for profit as in *Attorney-General* v. *Company of Proprietors of Margate Pier and Harbour*[2]. As the learned Judge pointed out, the plaintiff's petition and memorandum of association make it clear that the plaintiff is a non-profit making corporation and this would equally apply to MU which it is sponsoring.

A university established under the 1971 Act even if private clearly has the requisite public element, as it is subject to some degree of public control in its affairs and involves a number of public appointments to office in its framework, acts in the public interest and is eligible for grants-in-aid from public funds. Under section 3 of the 1971 Act the Minister of Education is responsible for the general direction of higher education and the administration of the Act. A university can receive grants-in-aid authorized by Parliament under section 11 and in this connection the Minister of Education has certain supervisory responsibilities. His Majesty and in effect the defendant would be responsible for the establishment of the campus and for making an order for this purpose in accordance with the provisions of section 12 and land may be acquired for the purposes of a university under section 13. The Minister of Education has also certain functions in relation to student activities and discipline under sections 15A and 15D.

The Constitution of a university must contain provisions for all matters set out in the schedule to the Act (section 8) and these give wide powers to the administration of the university. The appointment of the Chancellor and Vice-Chancellor is to be made by His Majesty on ministerial advice and after consultation with the Council of the university in the latter case, and of the Deputy Vice-Chancellor by the Minister of Education. Appointments to the Council and Court of the university include those by His Majesty and the Rulers and Governors of the several States and the Council

will also include designated Government officers. His Majesty has power to amend the Constitution of a university at any time (section 8(3)) and by order exempt, vary or add to any of the provisions of the schedule to the Act (section 26).

It is therefore quite clear that there is a public element in a university.

A university is quite distinct from an entity incorporated under the Companies Act.

A company incorporated under the Companies Act is not created by that statute and only comes into existence in accordance with its provisions, that is by the Registrar of Companies, on the registration of its memorandum, certifying under subsection (4) of section 16 of the Companies Act No. 79 of 1965 that the company is on and from the date certified in the certificate, incorporated; and may not have any statutory or public duty imposed on it. There is a well-marked distinction between a body created by statute and one which after having come into existence is governed in accordance with the provisions of the statute in question.

In our judgment, a university is therefore a statutory authority exercising powers vested in it by federal law and therefore a public authority. In reaching our conclusion we are greatly influenced by the scheme of the 1971 Act which is peculiar to Malaysia in that it prohibits the establishment of a university within its context except in accordance with its provisions (section 5) and that a university when established thereunder is deemed to have been established by section 7(1) thereof.

While it is true as stated by the learned Judge, (page 360) following *Minister of Home Affairs* v. *Fisher*[3], that a Constitution should be construed with less rigidity and more generosity than ordinary law, nevertheless, like the Constitution of Western Nigeria which fell to be considered by the Privy Council in *Adegbenro* v. *Akintola*[4], our Constitution, paraphrasing the words of Viscount Radcliffe at page 551 in that case, now stands in its own right; and while it may be useful on occasion to draw on the practice and doctrine of other countries – cases from the United States, Canada, England and India were cited to us – it is in the end the wording of our Constitution itself that is to be interpreted and applied, and this wording can never be overridden by the extraneous principles of other constitutions.

Also, our approach to our Constitution should be the same as the approach of the Indian Supreme Court to problems of interpreting the Indian Constitution. On this Fazal Ali J. said at page 774 in *Pathumma* v. *State of Kerala*[5]:

> "Courts interpret constitutional provisions against the social setting of the country so as to show a complete consciousness and deep awareness of the ... requirements of ... society, the ... needs of the nation, the ... problems of the day ... It must take into consideration the temper of the times and the living aspirations and feelings of the people."

It is well known that the Reid Commission included Mr. Justice Malik of the Allahabad High Court who was presumably familiar with the Indian Constitution from which many provisions of our Constitution were taken, and when we contrast the language of Articles 29 and 30 of the Indian Constitution which provide as follows:

> "29 (1) Any section of the citizens ... having a distinct language ... of its own shall have the right to conserve the same.
>
> 30(1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice."

and which were omitted from the provisions recommended for inclusion in our Constitution, we cannot help but conclude that the word "using" in proviso (a) to our Article 152 cannot also mean "teaching in" as was contended by Mr. Beloff.

Mr. Beloff strenuously argues that the words "a statutory authority exercising powers vested in it by federal ... law" in the definition of "public authority" take their colour from the surrounding words by virtue of the maxim *noscitur a sociis* and that therefore for an authority to be a public authority it must have governmental or quasi-governmental attributes which he submits MU if established would not have. We do not agree for the reasons already given. Furthermore, official purpose as defined by Clause (6) of Article 152 draws a distinction between the purpose of Government on the one hand and on the other the purpose of a public authority which is also included within the definition. The word "include" is clearly used:

> "in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also these things which the interpretation clause declares that they shall include" *per* Lord Watson at page 105 in *Dilworth* v. *Commissioner of Stamps*[6].

Thus in our judgment a public authority includes not only a body of a governmental or quasi-governmental nature but indeed any authority with a public element established by statute and exercising powers vested in it by federal law.

In our view, the nature and classification of powers are irrelevant. What is important is the source from which the powers come. The definition clearly says:

"Public authority means ... a statutory authority exercising powers vested in it by federal or State law ..."

It is clear from the language of the definition that as long as powers exercisable by an authority established by statute are vested in or conferred on it by federal or State law, the statutory authority concerned is a public authority. To accept Mr. Beloff's submission on this point would render nugatory the word "powers vested in it by federal or State law". The test is, (a) whether or not an authority is established by federal or State law, and if so (b) whether the powers exercisable by it are vested in it by federal or State law. If the answer to each question is yes, then the situation is a public authority.

The fact that the Federal and High Courts are excluded from the definition of public authority does not affect the question before us. It is due to the need to maintain judicial independence, and to make clear that these courts are not part of the Executive.

CONCLUSION

In any event, bearing in mind the history of education in this country and the divisive results of allowing separate language schools and the lesson learned from the experience of our neighbour with a private university and the determination of Parliament to so regulate schools and universities and education generally as an instrument for bringing about one nation out of the disparate ethnic elements in our population, we have no choice but to hold, as we have already held, that MU if established would be a public authority within Article 160(2) of the Constitution and that accordingly teaching in Chinese there would be use of that language for an official purposes, which use may be prohibited under Article 152.

As there is no right to use the Chinese language for an official purpose, accordingly in our judgment it was not unconstitutional and unlawful of Government to reject the plaintiff's petition to establish MU.

We would therefore dismiss this appeal with costs.

Over a period of six days Mr. Beloff addressed to us many other arguments, but in view of our conclusion on the meaning of Article 152 which is decisive of the result of this appeal, we do not think it strictly necessary to deal with them at any length. They were dealt with in detail by the learned trial Judge and we are in complete agreement with his conclusions thereon on the application of the principles of law involved to the facts of the matter before us.

Before departing from this case, we would like to remark that it is unfortunate that there is a widespread tendency on the part not only of the Chinese to demand the establishment of this or that institution of learning as part of a campaign to win favour with the electorate. This is especially marked when a general election is looming. An unfortunate effect of this tendency is the need to appeal to racial and linguistic sentiments and the arousing of strong emotions on the part of those whose language is being championed and equally strong reactions on the part of those whose language is thought to be threatened. It is realized that this is a legacy from pre-merdeka days when the different races were educated in separate compartments. Now that we have been in charge of our own destiny for 25 years, our people should be mature enough to realize the importance as regard sensitive issues of keeping the political temperature down rather than up, they should agree to regard universities and schools as an educational rather than a political problem, and that they are a vital instrument in nation-building.

Seah J. (dissenting): I have the advantage of reading the draft judgment prepared by the learned Lord President in which His Lordship *inter alia,* held that a university incorporated under the Universities and University Colleges Act 1971 would be a public authority within the definition of Article 160(2) of the Federal Constitution and that using the Chinese language as a medium of instruction in the proposed Merdeka University would be using that language for an official purpose which use may be prohibited under Article 152(1)(a). I have the misfortune to differ from this conclusion and I propose to state without going into much detail the basis of my dissent.

The facts giving rise to this appeal have been succintly set out by the learned Lord President in his judgment and I will not repeat them here. Suffice for me to say that, in my opinion, this appeal turns on the proper interpretation to be given to Article 152(1)(a), Article 152(6) and Article 160(2) of the Constitution.

Art. 152(1) provides that the national language shall be the Malay language and shall be in such script as Parliament may by law provide:

Provided that –

(a) no person shall be prohibited or prevented from using (otherwise than for official purposes) or from teaching or learning, any other language.

I agree with the view of the learned Lord President that the undermentioned construction be given to Article 152(1)(a), namely –

1) Bahasa Malaysia is the national language;
2) Bahasa Malaysia is the official language;
3) A person is prohibited or prevented from using any other language for official purposes (section 2 National Language Act);
4) No person shall be prohibited or prevented from using the Chinese language for non-official purposes; and
5) No person shall be prohibited or prevented from teaching or learning the Chinese language.

In the light of these interpretations I also agree with the view of the learned Lord President that Government cannot legally prohibit or prevent Merdeka University from teaching Chinese and offering courses to enable students to learn Chinese. The above interpretations do not appear to support the view of the learned trial judge that "using" should be confined to use as a medium of expression or communication within the language of ethnic groups concerned. In my opinion, "using" does not mean "speaking" and it would be wrong to give such a narrow and artificial construction to the word "using" when the only restriction imposed by Article 152(1)(a) is limited to using any other language or the Chinese language for official purposes only. In short, Bahasa Malaysia must only be used for official purposes. There is nothing in Article 152(1)(a) to prohibit or prevent the using of the Chinese language for non-official purposes, and it is within the legitimate right of a businessman to put up his business signboard in the Chinese language as well as in the national language. In my opinion, this constitutional privilege guaranteed by Article 152(1)(a) should be given a liberal interpretation and no attempt should be made to whittle it down.

In Article 152(6) "official purpose" means any purpose of the Government, whether Federal or State, and includes any purpose of a public authority.

Article 160(2) provides that "In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say –

"Public authority" means the Yang di-Pertuan Agong, the Rulers or Yang di-Pertua Negeri of a State, the Federal Government, the Government of a State, a local authority, a statutory authority exercising powers vested in it by Federal or State law, any court or tribunal other than the Federal Court and the High Courts, or any officer or authority appointed by or acting on behalf of any of those persons, courts, tribunals or authorities.

In the context of this appeal I will only concern myself with that part of the interpretation clause where "a public authority" means "a statutory authority exercising powers vested in it by Federal law, viz. Universities and University Colleges Act 1971".

According to the view of the learned Lord President the operative word in the definition in Article 160(2) of the phrase "a public authority" must necessarily be the word "authority". With the greatest respect, I do not agree with this view inasmuch as not every statutory authority would be a public authority; only a statutory authority exercising powers vested in it by Federal or State law would come within the definition of a public authority. In my opinion, the operative word is "powers" and not "authority".

Now, there are two forms of interpretation clause. In one, where the word defined is declared to "mean" so and so, the definition is explanatory and *prima facie* restrictive. In the other, where the word defined is declared to "include" so and so, the definition is extensive. Here, "public authority" means so and so and the word "include" is not used in the definition in Article 160(2).

It is a general rule of construction that where a particular class is spoken of, and general words follow, the class first mentioned is to be taken as the most comprehensive, and the general words treated as referring to matters *ejusdem generis*

with such class (per Pollock C.B. in *Lyndon* v. *Standbridge*[7]). And in *Queen* v. *Edmundson*[8] Lord Campbell C.J. said:

"The general principle laid down in all the cases which have been cited is that, where particular words are followed by general words, the latter must be construed as *ejusdem generis* with the former".

Applying this canon of construction here, in my opinion, the word "powers" should be confined to governmental or quasi-governmental powers. In other words, only a statutory authority exercising governmental or quasi-governmental powers vested in it by Federal or State law would be held to be a public authority within the meaning of a public authority defined in Article 160(2).

The powers of a university incorporated under the Universities and University Colleges Act 1971 are clearly stated in Reg. 4(1) of the Constitution in the Schedule to the Act. The nature of these powers may be summarised as follows:

(a) to provide courses of instructions, to hold examinations, to make provision for research and to take such steps as may appear necessary or desirable for the advancement and dissemination of knowledge;

(b) to confer degrees upon persons who have followed approved courses of studies and have satisfied the university requirements;

(c) to recognise degrees of other institutions of higher learning;

(d) to confer degrees upon teachers of the university;

(e) to confer honorary degrees on distinguished persons;

(f) to grant certificates;

(g) to institute lectureships, etc.;

(h) to set up a university printing press, etc.;

(i) to maintain libraries and other buildings required for the purposes of the university;

(j) to confer Fellowships, scholarships, etc.;

(k) to invest in land or securities, etc.;

(l) to enter into contracts, etc.;

(m) to appoint teaching staff, etc.;

(n) to regulate the conditions of service of the teaching staff;

(o) to establish pension or provident fund;

(p) to build houses for the teaching staff;

(q) to demand and receive fees, etc.;

(r) to do all such acts and things in order to further instruction, research, finance, administration, welfare and discipline in the university.

A perusal of these powers in Reg. 4(1) of the constitution of a university established under the 1971 Act shows plainly that they are not what we may term governmental or quasi-governmental powers but general administrative powers, duties, functions and jurisdictions conferred or imposed on the university by the 1971 Act. These powers are concerned with the internal organisation and management of a modern university.

Since a university incorporated under the Universities and University Colleges Act 1971 would not be exercising governmental or quasi-governmental powers vested in it by Federal law it follows that such a university would not be a public authority. In my opinion, the proposed Merdeka University if established under the 1971 Act would not be a public authority within the meaning of the definition in Article 160(2) of the Constitution of Malaysia, the proposed use of the Chinese language as a medium of instruction in the said university would not be use for an official purpose and such use would not be unconstitutional but is expressly protected and guaranteed by Article 152(1) (a) of the Federal Constitution.

In holding that the word "powers" should be confined to governmental or quasi-governmental powers vested in it by the Universities and Uniuniversity Colleges Act 1971 I am much influenced by the fact that both the Federal Court and the High Courts in Malaya and Borneo are expressly excluded from the definition of a public authority in Article 160(2). Like the Federal and the High Courts, a university incorporated under the 1971 Act, being an institution of higher learning, should not, in my opinion, be an instrumentality of the government and this particularly so when the Constitution of Malaysia is modelled on the Wesminster-type based on parliamentary democracy. Although such a university would not be a public authority I am of the view that such an institution of higher learning would still be subject to Art. 153 of the Constitution inasmuch as Article 153(8A) provides that:

Notwithstanding anything in this Constitution, where in any University, College and other educational institution providing education after Malaysian Certificate of Education or its equivalent, the number of places offered by the authority responsible for the management of the University, College or such educational institution to candi-

dates for any course of study is less than the number of candidates qualified for such places, it shall be lawful for the Yang-di-Pertuan Agong by virtue of this Article to give such directions to the authority as may be required to ensure the reservation of such proportion of such places for Malays and natives of any of the States of Sabah and Sarawak as the Yang di-Pertuan Agong may deem reasonable; and the authority shall duly comply with the directions."

Reference has been made to the case of *Griffiths* v. *Smith*[1]. This case and many others like it are dealing with the Public Authorities Protection Act 1893 where section 1 reads:

"Where ... any action, prosecution or other proceeding is commenced in the United Kingdom against *any person* for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty, or authority, the following provisions shall have effect:

(a) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect or default complained of or, in case of continuance of injury or damage, within six months next after the ceasing thereof;"

Lord Porter said at p. 205:

"The wording of the section is in very general terms, but certain limitations have been placed upon the width of its interpretation by decisions, one at least of which is binding upon your Lordships' House. (Lord Porter was referring apparently to the case of *Bradford Corporation* v. *Myers*[9]). In the first place, though the word 'person' is used, not every person is protected. It is a 'Public Authorities Protection Act' and not a 'persons protection act' and therefore the body to be protected must be a public authority."

On the other hand, the phrase "public authority" has been statutorily defined in Article 160(2) of the Federal Constitution and I recall the caution of Viscount Radcliffe in *Adegbenro* v. *Aktintola*[4] when in dealing with the Constitution of Western Nigeria His Lordship said at p. 550:

"– Whereas the Constitution of Western Nigeria is now contained in a written instrument in which it has been sought to formulate with precision the powers and duties of the various agencies that it holds in balance. That instrument now stands in its own right; and, while it may well be useful on-occasions to draw on British practice or doctrine in interpreting a doubtful phrase whose origin can be traced ... it is in the end the wording of the Constitution itself that is to be interpreted and applied, and this wording can never be overridden by the extraneous principles of other Constitutions which are not explicitly incorporated in the formulae that have been chosen as the frame of this Constitution."

There are two other matters I like to comment upon which do not appear to have been specifically dealt with by the judgment of the learned Lord President. They concern the siting of the proposed Merdeka University and the fund factor. As regards the former section 6(1) of the Universities and University Colleges Act 1971 provides that if the Yang di-Pertuan Agong is satisfied that it is expedient in the national interest that a university should be established, he may by order ... (c) specify the location of the site which shall be the seat of that university. And in dealing with the fund factor, Y.A.B. Dato' Musa bin Hitam, the Deputy Prime Minister who was the Minister of Education at the material time said at p. 149 of the record of proceedings:

"Agree a waste of time to discuss details of financial matters in view of stand on linguistic ground.

"If in any application for university, all other considerations favourable and only question was finance available, I would have talked to the sponsors."

When considering these two matters it is pertinent to refer to the provision of section 23 of the 1971 Act which reads:

"23(1) No person shall establish, form or promote or do anything or carry on any activities for the purpose of establishing or forming or promoting the establishment or formation of a University or University College otherwise than in accordance with the provisions of this Act.

(2) Any person who contravenes subsection (1) shall be guilty of an offence and shall on conviction be liable to a fine of ten thousand dollars or to imprisonment for a term of five years or to both."

It seems plain from the testimony of the Deputy Prime Minister that if all considerations were favourable for the establishment of the proposed Merdeka University, he would have a meeting with the sponsors to discuss about availability of finance to maintain the said university. It is also logical to infer from this testimony that the Deputy Prime Minister would also discuss where the proposed university would be sited in view of section 6(1) of the 1971 Act.

I think it is not out of place to state that the activities of modern universities embrace a wider scope than mere teaching. When sufficiently financed, research and experimental work of great value to the public and nation is constantly being carried out by them. As a part of the work, scientific treatises of high practical worth are put forth which contribute substantially to state and national progress along industrial, economic and cultural lines. Indeed, the potentialities of service which may be rendered through these agencies cannot be

compassed by any small measure. The knowledge diffused by these institutions of higher learning radiates far beyond the student body.

In the result I would have allowed the appeal with costs.

Appeal dismissed with costs; certificate for two counsel; deposit to respondent against taxed costs.

Editorial Note: On Friday July 9, on application of the Attorney-General the court (coram: Suffian, L.P., Raja Azlan Shah, C.J. Malaya and M. Salleh Abas, F.J.) certified that the decision given by the court fell under paragraph (a) of subsection (3) of section 74 of the Courts of Judicature Act No. 7 of 1964.

Solicitors: *Baharuddin, Bernatt, Tan & Ker.*

RE CHIEW CHIANG SENG, DECD. DECEASED;

SIN SIAN HONG & ANOR. v. MAU YOON SWEE

[F.C. (Wan Suleiman Ag. C.J. (Malaya), Syed Othman and Abdul Hamid F.JJ.) September 7 & July 17, 1982]
[Johore Bharu – Federal Court Civil Appeal No. 44 of 1981]

Practice & Procedure – Appeal – Application that appellants be made to give security – Whether appellants are 'nominal plaintiffs' – Rules of the High Court, 1980, Order 23, rule 1(1)(b).

In this case the respondent had obtained judgment against the appellants with costs. The costs were taxed at $6,188.00 but the appellants had not paid the costs. The appellants were the administrators of the estate of Chiew Chiang Seng, deceased. The respondent applied for an order that the appellants be made to give security for the costs of the appeal. Reliance was placed on Order 23, rule 1(1) (b) of the Rules of the High Court, 1980.

Held, the appellants were not 'nominal plaintiffs' within the meaning of Order 23 rule 1(1) (b) of the Rules of the High Court, 1980, and therefore the application must be dismissed.

Cases referred to:

(1) *Rainbow* v. *Kittoe* [1916] 1 Ch.D. 313.

FEDERAL COURT.

A.K. Bashir for the appellants.

F.H. D'Cruz for the respondent.

Cur. Adv. Vult.

Wan Suleiman Ag. C.J. (Malaya) (delivering the Judgment of the Court): This is an application by way of Notice of Motion by the respondent in this appeal. On the 4th of March 1981 judgment with costs was delivered in his favour in the High Court, Malacca. Cost was taxed on May 5, 1981 at $6,188.00 inclusive of allocatur fees. The appellants have not paid the costs todate.

The Applicant/Respondent alleges that the appellants have no interest in the subject matter of the appeal. According to respondent they are merely nominal appellants acting as administrators of the estate of Chiew Chiang Seng @ Chew Chiang Seng, deceased. The assets of the estate of the aforesaid deceased is a claim to the land Holding No. 114, T.A. XXXV11, Malacca, the subject matter of this appeal.

The Applicant/Respondent claims that as a result of enquiries made by him he believes that there is no other asset of the estate apart from the land aforementioned. He fears that the appellants would not be able to pay the costs of the Applicant should they fail in their appeal. He therefore applies for an order that the appellants be made to give security in the sum of $30,000/– or such other sum as this Court thinks just for the costs of this appeal, and until such costs be given this appeal be stayed. Order 23 rule 1(1) (b) of the Rules of the High Court 1980 would therefore apply.

For convenience it is set out hereunder:

> '1. (1) Where, on the application of a defendant to an action or other proceeding in the High Court, it appears to the Court –
>
> (b) that the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so; or'.

It would therefore appear that the appellants are not nominal plaintiffs. For what a 'nominal plaintiff' is, see pages 393 and 394 of Supreme Court Practice 1979 Pt. I and *Rainbow* v. *Kittoe*(1). In the latter case the plaintiff who was an administrator, even though the letters of administration was only granted to him as the attorney of a person who was abroad and until that person obtained letters of administration, and although he was shown to be insolvent, was not ordered to give security for the defendant's costs.

We would therefore dismiss this Motion with costs.

Motion dismissed.

Solicitors: *Bashir & Co.; Thakurta & Low.*